for the three months of July, August and September, 1968, until October 7, 1968. The receipt at page 82 shows that the defendant did not pay rent due for the four months of October 1968 to January 1969 until February 24, 1969. The rent due for the six months of May to October, 1969, was not paid until November 8, 1969 (receipt on page 84). The rent due for the five months of November 1969 to March 1970 was not paid until August 1, 1970, leaving still unpaid at that date rent for the four months of April to July, 1970.

With respect, I think that the trial court was entitled on the evidence to hold, as it did, that there were several demands made for the rent on the premises both by the plaintiff and by her son and that at the time of the filing of the suit the rent was in arrear for seven months.

The notice to quit at page 74 simply told the defendant that as his rent had been in arrear for seven months from April 1 until October 31, 1970, he was to quit on or before December 31, 1971, and that his tenancy was being determined on that date or on the expiry of the next complete month; and the defendant complained before us that the plaintiff did not and should have complied with section 235 of the National Land Code which reads:

"235. Notwithstanding anything to the contrary contained therein, no person or body shall be entitled to enforce, by action or otherwise, the forfeiture of any lease, sub-lease or tenancy for breach of any of the provisions thereof unless and until that person or body has served on the lessee, sub-lessee or tenant for the time being a notice in writing —

(a) specifying the particular breach complained of;

(b) if the breach is capable of remedy, requiring him to remedy it, and

(c) in any case other than non-payment of rent requiring him to make compensation in money for the breach,

and the lessee, sub-lessee or tenant on whom the notice is served has failed, within a reasonable time thereafter, to remedy the breach (if it is capable of remedy) and to make reasonable compensation in money therefor to the satisfaction of that person or body."

It is said that the plaintiff should have served on the defendant a notice in writing —

(a) saying that the defendant was in arrear with his rent and

(b) requiring him to pay up,

and that as she did not, she should not have been given vacant possession. It is said that the defendant should have been given a chance to pay up the rent in arrear, that in fact immediately after receiving the notice the defendant did tender the rent and that as it has been tendered (though refused) it was not in arrear at all.

With respect, I do not think there is any merit in this argument. Section 235 of the Code deals with tenancies generally, whereas the Control of Rent Act deals specially with controlled tenancies, and I do not think that section 235 can apply to controlled tenancies which are regulated by the Control of Rent Act. To hold otherwise would be to nullify the provisions of section 16(1)(a) of the Act. If the defendant were allowed to benefit from section 235 of the Code, every time he is in arrear he would receive a written notice saying that he is in breach of covenant because he has not paid rent for so long, and requiring him to remedy the breach, and he would then tender the required amounts, and thereafter being a bad paymaster he would repeat the same breach and so on *ad infinitum;* and thus the landlord would never be able to get rid of him at all. The Act has made drastic curtailments of a landlord's rights to deal with his property in any way he likes, but I do not think that it is the intention of the legislature to enable a tenant to thumb his nose at his landlord in this way. I think that the intention of the legislature is that when rent falls due, is demanded (even orally) and is not paid as demanded and remains due for 14 days or more, all that the landlord need do is to give a valid notice to quit (as has been done here) without giving the tenant an opportunity to tender the rent due.

Under subsection (3) of section 16 the learned magistrate may allow the defendant to remain in possession even though the defendant has been in arrear with the rent as alleged. This subsection (3) was drawn to her attention, and yet she decided not to grant relief to the defendant. I do not think that this is a proper case where this court should interfere with the exercise of her discretion.

I would therefore dismiss this appeal with costs, the deposit to go to the respondent towards taxed costs.

Lee Hun Hoe C.J. (Borneo) and **Wan Suleiman F.J.** concurred.

Solicitors: *Kam Woon Wah & Co.; Atma Singh Gill & Gill.*

DIRECTOR-GENERAL OF INLAND REVENUE v. R.

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim and Wan Suleiman F.JJ.) December 22, 1975]
[Kuala Lumpur — Federal Court Civil Appeal No. 23 of 1975]

Income Tax — Termination of service — Payment of compensation — Whether compensation for loss of employment or gratuity in respect of having or exercising employment — Income Tax Act, 1967, s. 13(1)(a) and (e) and Schedule 6, para. 15(1)(b).

This was an appeal from the decision of Gill C.J. ([1975] 1 M.L.J. 183). The respondent had been employed by the Eastern Mining Metals Company Limited as a railway engineer on a number of short term contracts, the last of which dated September 24, 1969 made no mention of duration. Under the terms of each agreement termination was by three months' notice in writing to be given by either party. When it became apparent that the end of the mines was approaching, the company as an inducement to those senior officers whom they wished to retain gave an assurance in the form of a confidential letter that if the services of a non-Malaysian officer were no longer required, the officer would be paid a lump sum equal to one year's salary by way of compensation for loss of expectation of further employment. The respondent's services were terminated under the provisions of his last service agreement and he was paid a lump sum of $35,400. He was then 48 years old and had worked with the company for 19 years. The appellant was assessed for tax on the sum of $35,400 and on appeal the Special Commissioners held that the sum was paid to the appellant in respect of services rendered and was a remuneration or gratuity within the meaning of section 13(1)(a) of the Income Tax Act, 1967. On appeal by the taxpayer, to the High Court Gill C.J. held that the payment was by way of compensation for loss of employment and as such was not liable to income tax by reason of the exemption under paragraph 15(1)(a) of Schedule 6 to the Income Tax Act. The Director of Inland Revenue appealed to the Federal Court.

Held, dismissing the appeal: the irresistible inference to be drawn from the facts of the present case in the light of the relevant provisions of the Income Tax Act, 1967, is that the money paid to the taxpayer was compensation for loss of employment and not taxable by virtue of the exemption under paragraph 15(1)(a) of Schedule 6 to the Income Tax Act, 1967.

Cases referred to:-

(1) *H.* v. *Director-General of Inland Revenue (Haywood's case)* [1974] 2 M.L.J. 135; [1974] 3 All E.R. 872; [1975] A.C. 229.

(2) *Henrickson (Inspector of Taxes)* v. *Grafton Hotel Limited* [1942] 2 K.B. 184, 189; 24 r.c. 453.

(3) *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 T.C. 11, 25.

(4) *Comptroller-General of Inland Revenue* v. *T. (Knight's case)* [1972] 2 M.L.J. 73.

(5) *Chibbett* v. *Joseph Robinson & Sons* (1923-1925) 9 T.C. 48.

(6) *Henry* v. *Arthur Foster* 16 T.C. 605.

(7) *Holland* v. *Geoghegan* [1972] 1 W.L.R. 1473.

(8) *Cameron* v. *Prendergast* [1940] 2 All E.R. 35.

(9) *Riley* v. *Coglan* [1968] 1 All E.R. 314.

(10) *H.* v. *Director-General of Inland Revenue (Heywood's case)* [1973] 2 M.L.J. 40, 45.

(11) *Hunter* v. *Dewhurst* (1932) 16 T.C. 615.

(12) *H.M.T.* v. *Director-General of Inland Revenue* [1975] 2 M.L.J. 22, 25.

(13) *Pritchard* v. *Arundale* [1971] 3 All E.R. 1011.

FEDERAL COURT.

Haji Mohamed Nizar bin Idris (Senior Federal Counsel) for the appellant.

S. Woodhull for the respondent.

Lee Hun Hoe C.J. (Borneo) (read by **Ong Hock Sim F.J.**): This is an appeal against the judgment of Gill C.J. (Malaya) sitting in the High Court and reversing the decision of the Special Commissioners. The primary question is whether the learned judge was right to hold that the sum of $35,400 paid to the taxpayer by his employers was compensation for loss of employment and, therefore, not liable to income tax.

The facts of the case as set out fully by the Special Commissioners (see pages 5 to 14 of the Appeal Record) are not in dispute and also appear in the judgment of the learned judge. I propose, therefore, to state them briefly for the purpose of this judgment. The taxpayer was employed by the Eastern Mining & Metals Company Limited (EMMCO) as a railway engineer on a number of short term contracts, the last of which dated September 24, 1969 made no mention of duration. Under the terms of each agreement termination was by three months' notice in writing to be given by either party. In late 1966 the life expectancy of the mines was known to last at most up to six years. In order to retain some "key senior officers" EMMCO decided, as an inducement, by giving an assurance in the form of a confidential letter dated December 20, 1966 to these officers. The assurance was that if Government withheld permission for any of them to work in Malaysia because of Malayanisation or if the further services of any of them were no more required by EMMCO, such officer would be paid a lump sum equal to one year's salary by way of compensation for loss of expectation of further employment. By a notice dated December 12, 1970 the taxpayer's services were terminated effective from January 2, 1971. He was then 48 years old and had worked for the company some 19 years. As there was no age limit for senior officers working for the company it would seem that taxpayer could carry on working so long as his mental and physical conditions would permit or until the winding up of the company. His monthly salary was then $2,950. On the basis of the assurance given by the company in the said confidential letter, the taxpayer was paid a lump sum of 35,400. He was assessed to income tax on the ground that the lump sum paid to him was either a remuneration or a gratuity within the meaning of paragraph 13(1)(a) and assessable under section 4(b) of the Income Tax Act, 1967. The Special Commissioners rejected his contention that the lump sum was paid by his employers as compensation exempted under paragraph 15(1)(b) of Schedule 6 to the said Act. In view of his 19 years' service he would be entitled to claim exemption amounting up to $38,000. This would be more than the amount of compensation.

The appeal is mainly on the ground that the learned judge was wrong to rely on the case of *Heywood* v. *Director-General of Inland Revenue*[1] simply because the facts of that case and the case presently under appeal differ materially. It was conceded that both Heywood and the taxpayer were employed on a number of fixed period contracts. However, taxpayer's last contract did not specify duration. In Heywood's last contract duration was specified. The letter dated December 12, 1970 terminating the taxpayer's services merely stated that the termination was due to the exhaustion of the ore reserves and that the mine must close down. On the other hand, in *Heywood's* case[1] the letter of termination stated clearly that the sum of $32,000 was compensation for loss of employment. It was further said that whereas in *Heywood's* case[1] there was a scheme regarding payment of compensation there was no such scheme in the case of the taxpayer.

I do not think it makes any difference what the letter said about payment. The important thing is to consider the nature of payment by looking into all the facts including the confidential letter dated December 20, 1966 which is self-explanatory. This letter is in the following terms:—

"EASTERN MINING & METALS CO. LTD.

CONFIDENTIAL

20th December, 1966.

Mr. D.V. R.,

Dear Sir,

With a view to giving senior members of the staff a stronger feeling of security, particularly in view of the Malayanisation policy, the Management have decided to give the following assurance. In the event of the group finding themselves unable to continue to employ you at any time by reason of either:—

a) the Government declining to continue, or renew, permission for your further employment in Malaysia for any cause not involving a question of your personal conduct or

b) a change in the policy of the Group rendering your further employment inappropriate to our requirements,

this Company will ensure that they, or the associated company by which you might then be employed, will pay to you on the cessation of your employment by the Group a lump sum, equal to one year's salary at the basic rate then payable, by way of compensation for loss of expectation of further employment.

This is not a modification of your service agreement, present or future, all the provisions of which will be unaffected. It is a separate collateral undertaking. All the terms of your current contract of service apply in full, and should there be conflict, that contract of service shall pertain.

Yours faithfully,

EASTERN MINING & METALS COMPANY LTD.
Signed: Dato Jack Harris.
Chairman."

As regards the question of scheme, I agree entirely with what the learned judge said at page 81 of the Appeal Record:—

"... In *Heywood's case*[1] there was a scheme for calculating the payment of compensation right from the beginning. In the present case the scheme for calculating the payment of compensation was introduced rather late, but it was nonetheless a scheme."

It is true that in *Heywood's* case[1] the scheme applied to all while in the present case it applied to the senior officers only. Whether it applied to all or to some the nature of payment in both cases was the same. Lord Greene M.R. in *Henriksen (Inspector of Taxes)* v. *Grafton Hotel, Limited*[2] said: —

"... For this purpose the first thing to do is to examine the nature of the payment, that is to say, the nature of the subject in respect of which the payment is made. In this connection the manner of payment may be relevant as throwing light upon its nature. In many cases — and in my opinion this is one of them — the question will be found to answer itself once the true nature of the payment is ascertained."

Viscount Simon in *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society*[3] observed that: —

"The question always is what is the real character of the payment, not what the parties call it."

There is no merit in the contention that *Heywood's* case[1] has changed this test. It has not done so. To decide the nature of payment it is still necessary to consider all the facts and the relevant provisions of the law.

Revenue argued that the company could have increased the salary of the key senior officers but this would create dissatisfaction among the employees. The point is that the company did not do so. It could not be regarded as increased salary because if it was so the taxpayer would be entitled as of right to claim it as part of his salary. He could not do so here because the assurance in no way affected the terms of his contract of service. Consequently, the learned judge was right to reject the contention that the lump sum payment was deferred remuneration.

It has been submitted that though Privy Council decisions are binding if the law is in *pari materia* and the facts are similar and that since the facts in the present case are different, *Heywood's* case[1] should not be followed. It is difficult to find two cases where the facts are identical in every detail. There may be similarities. The facts in the present case are as closely parallel to *Heywood's* case[1] as any case could well be and such as to make it irresistible for the learned judge to upset the decision of the Special Commissioners. In both cases the termination of the contract was by three months' notice though in the present case the taxpayer was given a shorter notice of termination. Both received lump sum payments as compensation for loss of employment. It is not for the taxpayer to show that the money was compensation for loss of employment but for the revenue to establish that the money was remuneration or gratuity within the charging provisions of the Income Tax Act, 1967.

In both cases the same provisions of the Income Tax Act, 1967 apply and read as follows:—

"Section 4. Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:—

(b) gains or profits from an employment;".

"Section 13(1) Gross income of an employee in respect of gains or profits from an employment includes —

(a) any wages, salary, remuneration, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment;

....

(e) any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of the employment."

"Schedule 6

EXEMPTIONS FROM TAX

Part 1

Income which is Exempted

....

(15(1) A payment ... made by an employer to an employee of his as compensation for loss of employment....

(b) in the case of a payment made in connection with a period of employment with the same employer or with companies in the same group, in respect of so much of the payment as does not exceed an amount ascertained by multiplying the sum of two thousand dollars by the number of completed years of service with that employer or those companies."

I can do no better than to quote the observations made by Viscount Dilhorne on the said provisions in *Heywood's* case[1]: —

"So under this Act both sums paid as gratuities in respect of having or exercising the employment and sums paid as compensation for loss of employment are chargeable to tax but sums paid as compensation for loss of employment are then exempted from tax if they do not exceed the prescribed limit. The appellant had served his employers, so the Special Commissioners found, for 17½ years so the amount paid to him did not exceed the prescribed limit and if paid to him as compensation for loss of employment is exempted from liability to income tax. If, however, it was paid in respect of having or exercising his employment it is taxable."

The confidential letter of assurance dated December 20, 1966 sets out quite clearly the circumstances under which an employee would be paid compensation for loss of expectation of further employment. The taxpayer in the present case had served the company some 19 years when he received the notice of termination dated December 12, 1970. It was said that the mining industry, unlike planting industry, was a depleting industry. Yet, the taxpayer had served a far longer period than many in the planting industry. As he was one of those key officers whom the company wanted to retain his prospect of future employment was, therefore, real. Thus, his last contract did not specify duration. He could expect to continue to work until the company closed down so long as he was fit. The payment of a lump sum for termination of employment was not part of the terms of his contract. The payment could not be regarded as remuneration or deferred remuneration as this seems to assume that an employee has a right to the payment under his contract. As payment was not one which the taxpayer was entitled as of right under his contract, such pay-

ment could only be "compensation for loss of employment." This is precisely what was decided in *Heywood's* case.[1] Such money paid as compensation for loss of employment are exempted from tax if they are within the prescribed limit. If a payment was made as compensation for loss of employment, it would not be a payment "in respect of having or exercising the employment" for the two concepts are mutually exclusive.

The revenue sought to distinguish *Heywood's* case[1] from the *Comptroller-General of Inland Revenue* v. *T.* (*Knight's* case[4]) in that in the latter case there was a general hiring for an indefinite period so that the employment could be said to be "likely to continue" as laid down in *Chibbett* v. *Joseph Robinson & Sons.*[5] In the present case there was also a general hiring for an indefinite period. Briefly, the facts in *Knight's* case[4] are that the taxpayer was employed by a company as Chief Staff Surveyor. His terms of service were defined by an agreement in writing dated August 23, 1954. The service was not for fixed period and might be terminated with not less than three months' notice. He received a letter dated February 3, 1960 informing him that if at any future time should it be necessary to declare expatriate staff redundant, staff surveyors would be granted compensation for loss of office on terms not less generous than those applicable to redundancy. On November 25, 1965 he was declared redundant and paid redundancy pay of $28,050. The High Court allowed an appeal by the taxpayer from an order of the Special Commissioners and held that the sum was not assessable to tax. The Federal Court dismissed the appeal, lodged by the Comptroller-General whose appeal to the Privy Council was also dismissed. While *Knight's* case[4] is concerned with the 1947 Ordinance, *Heywood's* case[1] and the present case involve the 1967 Act. The provisions of both Acts were discussed by Viscount Dilhorne in *Heywood's* case: [1]

"The Revenue contended that the pay was taxable under section 10(1)(a) of the Income Tax Ordinance No. 48 of 1947 of Malaysia. The wording of that provision was slightly different to that of section 13(1)(a) of the Income Tax Act, 1967 in that it defined gains or profits from any employment as meaning, *inter alia*, a gratuity paid 'in respect of the employment', whereas the section of the Act uses the words 'in respect of having or exercising the employment.' Lord Wilberforce in the course of delivering the judgment of the Board (in *Knight's* case) said at page 434 that the question under section 10(1)(a) of the Ordinance was whether the money was paid in respect of the employment and 'if the fact is that it was paid in respect of the loss of the employment, it does not come within the taxing words'. It was held that the pay was not taxable."

Viscount Dilhorne continued:

"In this case the payment made to appellant cannot be regarded as one in respect of exercising his employment for it was one in respect of the cessation of his employment; nor is it to be decided as one in respect of his having the employment."

What was said above applies equally to the present case where the facts are quite similar. The letter terminating the taxpayer's employment in the present case is very much in the same tone as that in *Knight's* case.[4]

Where a sum of money is paid under a contract of employment it is taxable, even though it is received at or after the termination of the employment. See *Henry* v. *Arthur Foster.*[6] This proposition, as Lord Wilberforce mentioned, was put forward in *Knight's* case[4] and accepted by the Special Commissioners but rejected by Chang Min Tat J. and the Federal Court. He said mere silence in the face of an expression of intention by the company could not be taken as assent to a contractual change. This applies equally to the present case. The principle to be extracted from *Knight's* case[4] is that where there is no express bargain between a company and the employee concerning compensation for loss of employment, payment of such compensation is not taxable. This is also the position where payment is made expressly as consideration for abrogating a service agreement or where payment falls outside the taxing provisions of an income tax legislation.

It was submitted that in *Holland* v. *Geoghegan*[7] (payment of £450 for sale of salvageable materials), *Cameron* v. *Prendergast*[8] (payment of £45,000 to a director to withdraw his resignation) and *Riley* v. *Coglan*[9] (payment of £500 to a rugby player who was to refund proportionately if he could not play for certain period) were similar to the present case. Those cases are clearly distinguishable. Payment in *Holland's* case[7] was a form of substituted remuneration for his former right to share in the sale of the salvage. Payment to the taxpayer in the present case was not made in respect of any former rights of any kind as no such rights ever existed. In *Cameron's* case[8] the payment was made to the director while he was still a director who had threatened to resign. In the present case payment was in respect of the termination of his services. He made no threat to resign. The payment was not part of the contract but was paid for loss of employment. Also, there was no question of bargain. *Riley's* case[9] was one of those rugby league cases. The question of repayment does not arise in the present case if the taxpayer was injured or unable to work. Again, there is no question of bargaining. Payment was not part of the contract. I could not imagine the facts of a rugby league case to be similar to the present case in view of the different nature of the terms of the two contracts.

Suffian F.J., as he then was, delivering the judgment of this court in *Heywood's* case[10] referred to *Chibbett* v. *Joseph Robinson & Sons*[5] where Rowlatt J. said: —

"... compensation for loss of an employment which need not continue but which was likely to continue, is not an annual profit within the scope of the Income Tax at all",

but he preferred to rely on a passage in the judgment of Romer L.J. in *Henry* v. *Arthur Foster*[6] which reads: —

"a payment to the holder of an office as compensation for being deprived of profits to which as between himself and his employer he would, but for an act of deprivation by his employer..., have been entitled."

In allowing the appeal, Viscount Dilhorne, delivering the judgment of the Board in *H.* v. *The Comptroller-General of Inland Revenue*[1] said: —

"In *Hunter* v. *Dewhurst*[11] Lord Macmillan at page 653 criticised one passage in Rowlatt J.'s judgment in *Chibbett* v. *Joseph Robinson & Sons, supra*, thinking that it was too widely expressed as remuneration for services may take the form

of a payment at the end of the employment, and a payment does not necessarily cease to be remuneration for services because it is payable when the services come to an end. He did not criticise the passage from Rowlatt's J.'s judgment cited above. In *Comptroller-General of Inland Revenue* v. *Knight*[4] the decision in *Chibbett* v. *Joseph Robinson* was approved; and their Lordships in this case see no reason to dissent from or to question the proposition that for a payment to be compensation for loss of employment, there must be a real prospect of future employment. If that does not exist, then the payment cannot be compensation for the loss of earnings for the prospect of future earnings is not there."

The other recent case on termination payment is that of *H.M.T.* v. *Director-General of Inland Revenue*.[12] There appellant, on his third short term contract, had his services terminated while on leave in Denmark. He was paid $74,954.32 as gratuity on retirement. Abdul Hamid J. upheld the decision of the Special Commissioners that the payment was made in respect of his employment with the company and, therefore, a gratuity within the meaning of section 10(2)(a) of the Income Tax Ordinance, 1947. The facts in *HMT's* case[12] were admittedly similar to the facts in *Heywood's* case[10] and he considered rightly himself bound by it. When *HMT's* case[12] came before this court on appeal the Privy Council had already given their advice in *Heywood's* case[1] reversing the decision of this court. Had the learned judge had the advantage of the Privy Council decision in *Heywood's* case[1] he would not have come to the conclusion which he did. Gill C.J. (Malaya) delivering the judgment of this court with which the other two members concurred, said at page 25: —

"The facts in this case were almost identical with the facts in *Heywood's case*. The element of expectation in this case was more manifest in that the appellant was provided with a return ticket for himself and his family. There was some evidence that on his return he was to be made the manager of an estate. There was also some evidence that the appellant's services were terminated on account of Malayanisation. A payment on deprivation of an expectation of employment should be treated as compensation for loss of employment regardless of what it was called by the employers."

On the question that the payment made to the taxpayer was an emolument or an inducement to continue in employment, the case of *Pritchard* v. *Arundale*[13] was cited by both parties. The brief facts in that case are that a senior partner in a firm of chartered accountants was invited to join a company as full time joint managing director. In consideration of this 4,000 shares in the company were transferred to him. Held that the transfer of shares was not an emolument in the nature of a reward for services. Megarry J. made it clear that the payment must be made in reference to the services rendered under the office or employment, and as a reward for them and this would not be the same as a payment made "for" undertaking the office or employment. He made clear that the decision was not meant to provide as a sort of passport for tax-free emoluments disguised as initial lump sum inducements to enter an employment: for it was the realities of the payment that matter. In other words, one must look into the facts of each particular case to decide the nature of payment.

It would seem that when Gill F.J., as he then was, delivered his judgment in the High Court in *Heywood's* case[10] the judgment of the Privy Council in *Knight's* case[4] had not come to his notice otherwise he would have mentioned it. Because he was doubtful as to the correctness of his decision in *Heywood's* case[10] he decided to reserve his judgment in the present case until the judgment of the Privy Council in *Heywood's* case[1] was available to him. I agree with him that the facts in the present case are not very different from the facts in *Heywood's* case.[1] He found no difficulty in deciding the question in issue. It was contended that the learned judge disregarded the findings of facts by the Special Commissioners by which an appellate tribunal was bound. An appellate court would be slow to interfere with the finding of fact by a subordinate court. However, inferences from facts stated by the Commissioners are matters of law, and can be questioned on appeal and this applies to construction of documents. See *Cameron* v. *Prendergast*.[8] The irresistible inference to be drawn from the facts of the present case in the light of the relevant provisions of the Income Tax Act 1967 is that the money paid to the taxpayer was compensation for loss of employment and not taxable by virtue of the exemption. With respect, the learned judge was, therefore, right to reverse the decision of the Special Commissioners. I would, therefore, dismiss the appeal with costs both here and below.

Ong Hock Sim and **Wan Suleiman F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

ELECTRICAL INDUSTRY WORKERS UNION v. REGISTRAR OF TRADE UNIONS & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim and Wan Suleiman F.JJ.) December 22, 1975]
[Kuala Lumpur — Federal Court Civil Appeal No. 77 of 1975]

Administrative Law — Application for declaration — Whether trade union has exclusive right to decide whether workmen within scope of membership — Whether Registrar of Trade Unions empowered to rule on eligibility of workers to join trade union — Alternative remedy by way of appeal — R.S.C. 1957, O.54A — Trade Unions Ordinance, 1959, s. 2(2).

Practice and Procedure — Application for declaration — Whether properly made by originating summons — R.S.C. 1957, O.54A.

In this case the appellants wished to absorb into its membership the workmen employed by Mosanto Electronics Sdn. Bhd. The Registrar of Trade Unions ruled that a worker employed in the electronic industry did not come within the definition of workmen in the rules of the appellants' union. The appellants applied by originating summons for declarations *inter alia* (a) that they had the exclusive power to decide whether workers are within the scope of their membership under the rules of the trade union and (b) that the Registrar of Trade Unions has no power to rule on the eligibility of the workers to join the trade union or to forbid the trade union from taking the said workers as its members. The learned judge of the High Court dismissed the application (*ante* p. 79) and the appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) the learned judge was not bound to make the declaratory orders if he considered that the question of construction ought not to be brought by way of originating summons;

(2) (Wan Suleiman F.J. dissenting) the learned judge was correct in striking out the application on the ground that the procedure by way of originating summons was not suitable in challenging the decision of the Registrar of Trade Unions as the question of membership in this case involved the application of facts pertaining to the work of electric workers and the work of electronic workers respectively;